

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JIHAD MUHAMMAD-BEY,

No. C 10-0667 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

JOHN HAVILAND, Warden,

Respondent.

_____ /

Petitioner Jihad Muhammad-Bey aka Charles Anderson, a prisoner incarcerated at Solano State Prison in Vacaville, California, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, which, for the reasons that follow, the Court denies.

I

On April 11, 2006, a jury convicted Petitioner of four counts of second degree robbery. Ex. 1, Clerk's Transcript (CT) 179-181, 184-87. The jury found the weapon-use allegation true, as well as the allegation of infliction of great bodily injury. CT 184-87. On April 12, 2006, the trial court found Petitioner had suffered eleven prior convictions. Ex. 2, Vol. 7 Reporter's Transcript (RT) 12. On July 31, 2006, the trial court imposed an indeterminate sentence of seventy-five years to life on the robbery convictions and a determinate term of twenty-five years on the

1 sentence enhancements. CT 230-31; 7 RT 11-17. On August 27, 2007,
2 the California Court of Appeal affirmed the judgment. Ex. 6. On
3 November 14, 2007, the California Supreme Court denied review. Ex.
4 7, 8. On February 2, 2009, Petitioner filed a petition for a writ
5 of habeas corpus in the San Francisco superior court. Ex. 9. On
6 July 14, 2009, the superior court issued a two-page denial. Ex. 9.
7 Petitioner filed timely petitions for a writ of habeas corpus in the
8 California Court of Appeal and the California Supreme Court. Exs.
9 10, 12. Each court issued a one-sentence denial. Exs. 11, 13.

10 On February 17, 2010, Petitioner a filed a timely petition
11 for a writ of habeas corpus in this Court. On July 1, 2010, the
12 Court issued on Order to Show Cause, finding that Petitioner had
13 stated claims of ineffective assistance of trial and appellate
14 counsel based on failure to investigate and present evidence of his
15 mental impairment and failure to challenge the constitutionality of
16 his prior convictions used to enhance his sentence. Respondent has
17 answered and Petitioner has filed a traverse.¹

21
22 ¹ In his traverse, Petitioner attempts to assert an Equal
23 Protection claim based on discrimination due to his Moorish-American
24 heritage and a Fourth Amendment claim based on a warrantless search
25 of his living quarters in a homeless shelter. Because these claims
26 were raised for the first time in his traverse, Respondent does not
27 address them. "A traverse is not the proper pleading to raise
28 additional claims for relief" on federal habeas review. Cacoperdo v.
Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). In order for the state
to be properly notified of additional claims, they should be presented
in an amended petition, to which the state can file an answer. Id.
Therefore, to the extent that Petitioner raises additional claims in
his traverse, the Court denies relief.

II

The statement of facts is taken from the briefs Petitioner and Respondent submitted on direct appeal to the California Appellate Court, exs. 3 and 4, and the trial transcript. On March 3, 2005, at approximately 4:00 p.m., San Francisco police officer Mark Gamble, working in an off-duty position as a security guard at the Embarcadero Center in San Francisco, saw Petitioner leaning on a cement wall in the vicinity of ramps leading to and from the parking garage in Embarcadero Number 3. 3 RT 74. Because Petitioner was alone and appeared nervous and agitated, Officer Gamble decided to further observe him. 3 RT 75. Officer Gamble circled around to Petitioner's location, but when he arrived, Petitioner was gone. 3 RT 76. Officer Gamble walked around searching for Petitioner and observed him again near Clay Street, emerging from behind a pillar on the ramp of the garage. 3 RT 76. Petitioner was wearing a black ski cap, a red, black and grey nylon jacket, black pants and white shoes. 3 RT 83. When Officer Gamble made eye contact with Petitioner, Petitioner immediately walked up to Officer Gamble. 3 RT 77. This startled Officer Gamble because Petitioner was nervous and animated, and kept putting his hands in and out of his pocket. 3 RT 77. Officer Gamble asked Petitioner to stay a few feet away from him and Petitioner complied. 3 RT 77. Petitioner told Officer Gamble that he had been robbed the night before and someone had hit him with a knife. 3 RT 78. Petitioner also told Officer Gamble that he was waiting for someone, but Officer Gamble did not see anyone in the vicinity during his encounter with Petitioner. 3 RT 79.

1 Officer Gamble contacted Officer Kevin Richins, also an
2 officer with the San Francisco Police Department working off-duty as
3 security for the Embarcadero complex. Petitioner identified himself
4 to the officers as Charles Anderson and that he was residing at a
5 homeless shelter on Turk and Leavenworth Streets in San Francisco.
6 3 RT 82. Officer Richins did a pat-down search of Petitioner and
7 removed from his jacket pocket a large concrete rock with jagged
8 edges, approximately four inches by six inches. 3 RT 84.
9 Petitioner was not detained further.

10 On March 5, 2005, at approximately 8:00 p.m., Ai Jing
11 Huang was working as a parking attendant at a parking garage at 622
12 Washington Street in San Francisco. 3 RT 95. Huang was alone and
13 noticed Petitioner walking down the ramp of the parking garage. 3
14 RT 96, 98. Petitioner was wearing a black cap, a black and red silk
15 jacket and black jeans. 3 RT 99-100. When Petitioner was
16 approximately three feet away from Huang, he pulled out a metal rod,
17 about ten inches in length. 3 RT 101. When Huang tried to stand
18 up, Petitioner hit him twice with the metal rod. 3 RT 102.
19 Petitioner said, "give me money," and Huang pulled out approximately
20 \$200 from his pocket and gave it to Petitioner. 3 RT 102. When
21 Petitioner asked Huang for more money, Huang said it was all he had,
22 and Petitioner hit him on the right forearm and on his left ribs
23 with the metal rod. 3 RT 103. Huang got up and hit Petitioner with
24 his chair. 3 RT 103. Petitioner said, "I am going to kill you, I
25 am going to kill you." 3 RT 104. Huang called out to someone for
26 help, and Petitioner ran away. 3 RT 106. Huang called 911 and
27 Officer David On of the San Francisco Police Department responded.
28 Huang gave him a description of Petitioner. Huang later identified

1 Petitioner from a photo line-up. 3 RT 117. He later identified
2 Petitioner at the preliminary hearing and at the trial. 3 RT 98,
3 108.

4 On March 6, 2005, at approximately 7:30 p.m., Senait Gebre
5 and Sendeku Kassie were working behind the counter at Zane's Liquor
6 Store at 246 Second Street in San Francisco when Petitioner entered
7 the store wearing a black and red jacket, black pants and black
8 shoes. 4 RT 163-66. Petitioner first went to the cooler and
9 retrieved a bottle of water. When he went to the counter, he
10 grabbed Kassie's cordless phone and put it in his pocket, grabbed
11 Kassie, dragged him from behind the counter and beat him on the head
12 with a piece of metal four or five times, causing Kassie to fall to
13 the ground. 4 RT 168-71. Petitioner said, "give me the money, give
14 me the money." 4 RT 172. Gebre opened the cash register and threw
15 the money at Petitioner. 4 RT 172. Gebre believed Petitioner took
16 between \$600 and \$1,000. They called the police and Gebre provided
17 them with a description of Petitioner. 4 RT 174. Gebre later
18 identified Petitioner from a photo line-up, but she wrote that she
19 was not "100% sure" of her identification. 4 RT 186. She also
20 identified Petitioner at the preliminary hearing and the trial as
21 the person who robbed her, but she stated that she was only 50% sure
22 of her identification. 4 RT 182. Kassie was unable to identify the
23 person that robbed him from a photo line-up or at the preliminary
24 hearing. 5 RT 13-14.

25 On March 9, 2005, at approximately 4:00 p.m., Jose Rimon
26 was working at the parking garage at 600 Harrison Street in San
27 Francisco as a valet and cashier. 5 RT 29. Rimon was working alone
28 in a booth located at the bottom of the ramp that led in and out of

1 the garage. 5 RT 30. Petitioner walked down the ramp to Rimon and
2 said "give me the money." 5 RT 31. Rimon walked out of the booth
3 and Petitioner removed a steel pipe, about two feet long, from
4 behind his back. 5 RT 32-33. Petitioner then whacked Rimon on the
5 head and his body with the pipe. 5 RT 33. A woman leaving the
6 garage in her car shouted to Rimon to jump in her car, which he did.
7 5 RT 35. As they were driving away, Rimon looked back and saw
8 Petitioner in the booth getting money from the drawer. 5 RT 35-37.
9 Rimon remembered that Petitioner wore a black cap and a white tee-
10 shirt. 5 RT 36. Rimon identified Petitioner at the preliminary
11 hearing and at the trial. 5 RT 38.

12 Eduardo Romero, maintenance foreman of the 600 Harrison
13 Street garage, was approaching his office, which was close to
14 Rimon's booth, when he heard sounds and saw Rimon bleeding from the
15 head. 6 RT 315-17. Rimon told him that he was being robbed and
16 Romero saw Petitioner taking money from the booth. 6 RT 317.
17 Romero identified the robber as wearing a black beanie, a white
18 shirt and black pants and he had a small goatee. 6 RT 319-20.
19 Romero identified Petitioner in a photo line-up, 6 RT 339, and at
20 the trial, 6 RT 321.

21 On March 11, 2005, Officer Shaughn Ryan of the San
22 Francisco police department and other officers executed an arrest
23 warrant for Petitioner at a shelter at 290 Turk Street in San
24 Francisco. 3 RT 68. They found Petitioner at the Turk Street
25 address and arrested him. 3 RT 68-69.

26 III

27 Under the Antiterrorism and Effective Death Penalty Act of
28 1996 ("AEDPA"), codified under 28 U.S.C. § 2254, a federal court may

1 not grant a writ of habeas corpus on any claim adjudicated on the
2 merits in state court unless the adjudication: "(1) resulted in a
3 decision that was contrary to, or involved an unreasonable
4 application of, clearly established Federal law, as determined by
5 the Supreme Court of the United States; or (2) resulted in a
6 decision that was based on an unreasonable determination of the
7 facts in light of the evidence presented in the State court
8 proceeding." 28 U.S.C. § 2254(d).

9 "Under the 'contrary to' clause, a federal habeas court
10 may grant the writ if the state court arrives at a conclusion
11 opposite to that reached by [the Supreme] Court on a question of law
12 or if the state court decides a case differently than [the] Court
13 has on a set of materially indistinguishable facts." Williams
14 (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the
15 'unreasonable application' clause, a federal habeas court may grant
16 the writ if the state court identifies the correct governing legal
17 principle from [the] Court's decisions but unreasonably applies that
18 principle to the facts of the prisoner's case." Id. at 413.

19 "[A] federal habeas court may not issue the writ simply
20 because that court concludes in its independent judgment that the
21 relevant state-court decision applied clearly established federal
22 law erroneously or incorrectly. Rather, that application must be
23 objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76
24 (2003) (internal quotation marks and citation omitted). Moreover,
25 in conducting its analysis, the federal court must presume the
26 correctness of the state court's factual findings, and the
27 petitioner bears the burden of rebutting that presumption by clear
28 and convincing evidence. 28 U.S.C. § 2254(e)(1).

The standard of review under AEDPA is somewhat different where the state court gives no reasoned explanation of its decision on a petitioner's federal claim. In such a case, a review of the record is the only means of deciding whether the state court's decision was objectively reasonable. Plascencia v. Alameida, 467 F.3d 1190, 1197-98 (9th Cir. 2006); Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). When confronted with such a decision, a federal court should conduct an "independent review of the record" to determine whether the state court's decision was an objectively unreasonable application of clearly established federal law. Plascencia, 467 F.3d at 1198; Himes, 336 F.3d at 853.

IV

1 process that the trial cannot be relied upon as having produced a
2 just result. Id.

3 In order to prevail on an ineffectiveness of counsel
4 claim, a petitioner must establish two things. First, the
5 petitioner must establish that counsel's performance was deficient,
6 i.e., that it fell below an "objective standard of reasonableness"
7 under prevailing professional norms. Id. at 687-88. Second, the
8 petitioner must establish that he or she was prejudiced by counsel's
9 deficient performance. Id. at 694.

10 To show that trial counsel's performance was deficient, a
11 petitioner must show that counsel made errors so serious that
12 counsel was not functioning as the "counsel" guaranteed by the Sixth
13 Amendment. Id. at 687. The relevant inquiry is not what defense
14 counsel could have done, but rather whether the choices made by
15 defense counsel were reasonable. Babbitt v. Calderon, 151 F.3d
16 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's
17 performance must be highly deferential, and a court must indulge a
18 strong presumption that counsel's conduct falls within the wide
19 range of reasonable professional assistance. Strickland, 466 U.S.
20 at 689.

21 To establish prejudice, the petitioner must show that
22 counsel's errors were so serious as to deprive the petitioner of a
23 fair trial, a trial whose result is reliable. Strickland, 466 U.S.
24 at 688. The test for prejudice is not outcome-determinative, i.e.,
25 the petitioner need not show that the deficient conduct more likely
26 than not altered the outcome of the case; however, a simple showing
27 that the defense was impaired is also not sufficient. Id. at 693.
28 The petitioner must show that there is a reasonable probability

1 that, but for counsel's unprofessional errors, the result of the
2 proceeding would have been different; a reasonable probability is a
3 probability sufficient to undermine confidence in the
4 outcome. Id. at 694.

5 The Due Process Clause of the Fourteenth Amendment
6 guarantees a criminal defendant the effective assistance of counsel
7 on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387,
8 391-405 (1985). Claims of ineffective assistance of appellate
9 counsel are reviewed according to the standard set out in
10 Strickland. Smith v. Robbins, 528 U.S. 259, 285 (2000); Moormann v.
11 Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010). First, the petitioner
12 must show that counsel's performance was objectively unreasonable,
13 which in the appellate context requires the petitioner to
14 demonstrate that counsel acted unreasonably in failing to discover
15 and brief a merit-worthy issue. Smith, 528 U.S. at 285; Moormann,
16 628 F.3d at 1106. Second, the petitioner must show prejudice, which
17 in this context means that the petitioner must demonstrate a
18 reasonable probability that, but for appellate counsel's failure to
19 raise the issue, the petitioner would have prevailed in his appeal.
20 Smith, 528 U.S. at 285-86; Moormann, 628 F.3d at 1106. It is
21 important to note that appellate counsel does not have a
22 constitutional duty to raise every nonfrivolous issue requested by
23 defendant. Jones v. Barnes, 463 U.S. 745, 751-54 (1983); Gerlaugh
24 v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997).

25 V. Investigation and Presentation of Mental Health Defense

26 A. Trial Counsel

27 Petitioner claims that counsel was ineffective for failing
28 to mount a credible diminished capacity defense due to the effects

1 of various psychotropic medications he was taking at the time the
2 crimes were committed. In support of this claim, Petitioner submits
3 a form for release of medical information to the office of the
4 public defender, that he signed on April 4, 2004. He also submits
5 an unsigned, undated, partially completed form from the public
6 defender's office which lists various medications and a diagnosis,
7 but the lines for the client's name, address and other identifying
8 information are blank. Respondent argues that this claim must be
9 denied because Petitioner has failed to show the viability of a
10 diminished capacity defense.

11 A defense attorney has a general duty to make reasonable
12 investigations or to make a reasonable decision that makes
13 particular investigations unnecessary. Strickland, 466 U.S. at 691;
14 Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011). However,
15 counsel is not required to pursue every claim or defense, regardless
16 of its merit, viability, or realistic chance for success. Knowles
17 v. Mirzayance, 556 U.S. 111, 124 (2009).

18 Diminished capacity, which was once a viable defense in
19 California, was abolished in 1982.

20 California Penal Code § 25, provides, in relevant part:

21 (a) the defense of diminished capacity is hereby
22 abolished. In a criminal action . . . evidence concerning
23 an accused person's intoxication, trauma, mental illness,
24 disease, or defect shall not be admissible to show or
negate capacity to form the particular purpose, intent,
motive, malice aforethought, knowledge, or other mental
state required for the commission of the crime charged.

25 . . .

26 (c) Notwithstanding the foregoing, evidence of diminished
27 capacity or of a mental disorder may be considered by the
28 court only at the time of sentencing or other disposition
or commitment.

1 Therefore, at the time of Petitioner's trial in 2006,
2 counsel could not have presented a defense that Petitioner was not
3 guilty due to diminished capacity from mental illness or disease.
4 Counsel's performance cannot be found to be deficient because he
5 failed to put on an unavailable defense. See Mirzayance, 556 U.S.
6 at 124.

7 At Petitioner's sentencing hearing, he informed the trial
8 court that he took psychotropic medication, and that he was seeing a
9 therapist and a psychiatrist. 7 RT 8. Also, at the hearing,
10 Petitioner told the court that he did not fault his counsel for not
11 obtaining his medical records because "they just weren't available
12 at the time." 7 RT 9. Counsel confirmed that he went to the
13 shelter where Petitioner lived to obtain his medical records, but he
14 was told that the records were destroyed after one year. 7 RT 10.
15 Counsel told the court that he was bringing Petitioner's mental
16 health issue to the court's attention "as just circumstance that
17 might cause the Court to show some leniency." 7 RT 10. The court
18 responded, "And I have to say in looking at the record, it's a
19 pretty significant record, and there are acts of violence,
20 considerable acts of violence. Based on that, I don't think I can
21 exercise my discretion to strike those priors, I cannot." 7 RT 11.

22 This dialogue illustrates two significant points. First,
23 contrary to Petitioner's claim, counsel did investigate and try to
24 obtain his mental health records. Petitioner acknowledged this at
25 his sentencing hearing. Therefore, Petitioner's claim that counsel
26 did not investigate is not supported by the record.

27 Second, trial counsel introduced evidence of Petitioner's
28 mental health at Petitioner's sentencing hearing, as was proper

1 under California Penal Code § 25(c). In sentencing Petitioner, the
2 court considered his mental health issues, but based upon
3 Petitioner's significant record of past convictions and his violent
4 conduct, the court did not strike any of Petitioner's prior
5 convictions, which would have reduced his final sentence.
6 Therefore, Petitioner's claim that counsel did not present mental
7 health evidence to the court is not supported by the record.
8 Because counsel's performance was not deficient, the Court need not
9 address Strickland's second prong regarding prejudice.

10 B. Appellate Counsel

11 Petitioner argues that appellate counsel was ineffective,
12 presumably for not raising this ineffective assistance of counsel
13 claim in his direct appeal.

14 Because trial counsel was not deficient in either investigating
15 Petitioner's mental health or in presenting evidence about it, a
16 claim of ineffective assistance of trial counsel based this issue on
17 appeal would likely not have succeeded. See Jones, 463 U.S. at 751-
18 54 (appellate counsel does not have a constitutional duty to raise
19 every nonfrivolous issue). Instead, appellate counsel focused on
20 the trial court's denial of the motion to suppress the evidence
21 obtained during Petitioner's encounter with Officers Gamble and
22 Richins. Exs. 3, 5. During that encounter, Petitioner made
23 statements about being robbed and being hit with a metal pipe. 2 RT
24 9. These statements were incriminating because Petitioner was
25 describing his own modus operandi in committing the charged
26 robberies. Also, during this encounter, the officers obtained
27 Petitioner's name and address, which later facilitated his arrest.
28 Given these incriminating statements, appellate counsel's decision

1 to appeal from the trial court's denial of the motion to suppress
2 was tactically sound.

3 Therefore, based upon an independent review of the record, the
4 Court finds that the state court's denial of the claim of
5 ineffective assistance of trial and appellate counsel based on
6 Petitioner's mental health was not an objectively unreasonable
7 application of clearly established federal law.

8 VI. Ineffective Assistance of Trial and Appellate Counsel Regarding
9 Sentencing

10 Petitioner contends his trial counsel was ineffective because
11 he failed to conduct an adequate investigation into the
12 constitutionality of Petitioner's 1989 prior convictions, which were
13 used to enhance his sentence. Petitioner argues that these prior
14 convictions were unconstitutionally obtained because trial counsel
15 in the 1989 case was also ineffective.

16 A petitioner generally may not attack the constitutionality of
17 a prior conviction used to enhance a later sentence. "[O]nce a
18 state conviction is no longer open to direct or collateral attack in
19 its own right because the defendant failed to pursue those remedies
20 while they were available (or because the defendant did so
21 unsuccessfully), the conviction may be regarded as conclusively
22 valid. If that conviction is later used to enhance a criminal
23 sentence, the defendant generally may not challenge the enhanced
24 sentence through a petition under § 2254 on the ground that the
25 prior conviction was unconstitutionally obtained." Lackawanna
26 County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001)
27 (citations omitted). On May 2, 1989, Petitioner received a fifteen
28 year sentence for the 1989 convictions. CT at 139-I & J. Given

1 this, Petitioner was not in custody at the time he was sentenced in
2 2006, and the 1989 convictions are no longer open to collateral
3 challenge in federal court.

4 The rule in California is the same. The California Supreme
5 Court has held, "In a current prosecution for a noncapital offense,
6 the interest of judicial efficiency does not justify a rule of
7 criminal procedure requiring that trial courts entertain motions to
8 strike based upon the constitutional ground of ineffective
9 assistance of counsel." Garcia v. Superior Court, 14 Cal. 4th 953,
10 966 (1997). Therefore, at the time Petitioner was sentenced,
11 counsel could not have raised a challenge to the his 1989
12 convictions based on ineffective assistance of counsel in that case.

13 Counsel's performance cannot be found to be deficient because
14 he failed to make an unmeritorious argument at Petitioner's
15 sentencing.

16 For the reasons discussed above, appellate counsel was
17 under no obligation to raise a spurious claim of ineffective
18 assistance of counsel based on the unconstitutionality of
19 Petitioner's 1989 convictions. See Jones, 463 U.S. at 751-52
20 (winnowing out weak or frivolous issues is the duty of appellate
21 counsel). Therefore, appellate counsel was not deficient for
22 failing to include in Petitioner's appeal a claim of ineffective
23 assistance of trial counsel founded on counsel's performance at
24 Petitioner's sentencing.

25 Based upon an independent review of the record, the Court
26 finds that the state court's denial of the claim of ineffective
27 assistance of trial and appellate counsel regarding Petitioner's
28

1 sentencing was not an objectively unreasonable application of
2 clearly established federal law.

3 VII


4 For the foregoing reasons, the Petition for a Writ of
5 Habeas Corpus is DENIED.

6 Further, a Certificate of Appealability is DENIED. See
7 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner
8 has not made "a substantial showing of the denial of a
9 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner
10 demonstrated that "reasonable jurists would find the district
11 court's assessment of the constitutional claims debatable or wrong."
12 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not
13 appeal the denial of a Certificate of Appealability in this Court
14 but may seek a certificate from the Court of Appeals under Rule 22
15 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the
16 Rules Governing Section 2254 Cases.

17 The Clerk is directed to enter Judgment in favor of
18 Respondent and against Petitioner, terminate any pending motions as
19 moot and close the file.

20 IT IS SO ORDERED.

21 DATED 08/02/2012

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23 _____
24 THELTON E. HENDERSON
25 United States District Judge
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